

No. 44561-1-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**Jacob Mattila,**

Appellant.

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Clark County Superior Court Cause No. 12-1-01888-0

The Honorable Judge Scott Collier

**Appellant's Opening Brief**

Jodi R. Backlund  
Manek R. Mistry  
Skylar T. Brett  
Attorneys for Appellant

**BACKLUND & MISTRY**  
P.O. Box 6490  
Olympia, WA 98507  
(360) 339-4870  
backlundmistry@gmail.com

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### **ISSUES AND ASSIGNMENTS OF ERROR**

1. Mr. Mattila was deprived of his Sixth and Fourteenth Amendment right to the assistance of counsel.
2. Defense counsel unreasonably failed to seek suppression of Mr. Mattila's statements based on the unlawful arrest.
3. Defense counsel unreasonably failed to seek suppression of evidence seized from Mr. Mattila's person and his car based on the unlawful arrest.

**ISSUE 1:** The Sixth and Fourteenth Amendments guarantee an accused person the effective assistance of counsel in a criminal case. In this case, defense counsel failed to seek suppression of evidence unlawfully obtained following an illegal arrest. Was Mr. Mattila denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel?

4. Defense counsel unreasonably failed to object to the introduction of a misleading redaction of Mr. Mattila's recorded statement.
5. Defense counsel's unreasonable failure to object to the misleading redaction of Mr. Mattila's recorded statement left jurors with the impression Mr. Mattila knew his coparticipants stole a gun, when his unredacted statement explicitly indicated that he thought they took only jewelry.

**ISSUE 2:** To be effective, counsel must interpose proper objections to inadmissible and prejudicial evidence. Here, defense counsel unreasonably failed to object to a misleading redaction of Mr. Mattila's recorded statement, which incorrectly gave jurors the strong impression that Mr. Mattila knew there was a firearm in the car he was driving. Must Mr. Mattila's UPF charge be reversed because he was deprived of the effective assistance of counsel?

6. The prosecutor committed misconduct that was flagrant and ill-intentioned.

7. The prosecutor improperly “testified” to “facts” outside the record.

**ISSUE 3:** A prosecutor commits misconduct by “testifying” to “facts” not in evidence and relying on passion and prejudice to obtain a conviction. Here, the prosecutor committed misconduct by “testifying” that Mr. Mattila and his coparticipants knew there was a child in the house during the time of the burglary. Did the prosecutor’s flagrant and ill-intentioned misconduct prejudice Mr. Mattila?

8. The prosecutor improperly urged jurors to convict based on passion and prejudice rather than the evidence.

**ISSUE 4:** A prosecutor may not seek conviction based on passion and prejudice. Here, the prosecutor asked jurors to convict based on passion and prejudice rather than the evidence introduced at trial. Must the convictions be reversed for prosecutorial misconduct?

9. Mr. Mattila’s UPF conviction violated his Fourteenth Amendment right to due process.
10. Mr. Mattila’s UPF conviction was based on insufficient evidence.
11. The prosecution failed to prove that Mr. Mattila knowingly possessed a firearm.

**ISSUE 5:** A conviction for unlawful possession of a firearm requires proof that the accused person knew he was in possession of a firearm. Here, the prosecution failed to present sufficient evidence to persuade a reasonable factfinder beyond a reasonable doubt that Mr. Mattila had actual knowledge there was a firearm in the car he was driving. Was the evidence insufficient to prove unlawful possession of a firearm?

12. The trial court erred by imposing attorney fees in the amount of \$1,500.

13. The imposition of attorney fees without any support in the record that Mr. Mattila has the present or future ability to pay violated his Sixth and Fourteenth Amendment right to counsel.

**ISSUE 6:** A trial court may only impose attorney fees upon finding that the offender has the present or likely future ability to pay. Here, the court imposed \$1,500 in attorney fees despite the absence of evidence supporting such a finding. Did the trial court violate Mr. Mattila's Sixth and Fourteenth Amendment right to counsel?

14. Mr. Mattila adopts and incorporates Mr. Bru's Assignment of Error No. 5.

**ISSUE 7:** Mr. Mattila adopts and incorporates Mr. Bru's Issue No. 5.

## **STATEMENT OF FACTS AND PRIOR PROCEEDINGS**

Jacob Mattila was eighteen years old when he met “Myk” and “Bulldog” in jail. RP 731. Mattila was serving his sentence for what was then his only criminal conviction. RP 731. Myk and Bulldog frequently commit burglaries and use the money to play “ding ding.”<sup>1</sup> Ex 97, page 39. When Mr. Mattila was nineteen, Myk and Bulldog paid him \$100 to serve as the driver while they burgled several houses. RP 501, 731.

Mr. Mattila was arrested near the scene of a burglary. RP 52. He admitted to acting as the driver for two other burglaries, including one for which he was not previously suspected. RP 251-52, 509-11. Mr. Mattila led the police to a house that his companions had burgled earlier that day. RP 251. The deputies took Mr. Mattila back to the precinct, where he participated in a lengthy recorded interview. RP 499, 509-11.

Based on his statements and evidence found in the car he was driving, the state charged Mr. Mattila with first degree burglary, two counts of residential burglary, possession of a stolen vehicle, two counts of theft of a firearm, first degree theft, and unlawful possession of a firearm. CP 1-3.

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<sup>1</sup> “Ding ding” is video poker, which Mr. Mattila is not old enough to play. Ex 97, page 39.

At a pretrial hearing, Deputy Rick Buckner testified that he responded to a 911 call. RP 50. A ten-year-old had reported that there was a stranger in her house. RP 50. When Buckner arrived, Mr. Mattila was parked and talking on the phone. RP 50-52. His car was on the street at the end of a long driveway. RP 51. The house was not visible from where Mr. Mattila was parked. RP 51. Buckner thought that the 911 call may have been based on a misunderstanding. RP 244. He did not yet believe that a burglary had taken place. RP 50, 53, 59. Despite this, Buckner arrested Mr. Mattila because his car matched the description – tan with a dark stripe – given to 911. RP 50, 53, 59.

Mr. Mattila's counsel argued that his statements should be suppressed because his decision to talk to the police had been affected by their promises of leniency if he cooperated. RP 88. Defense counsel did not argue that Mr. Mattila had been unlawfully arrested. RP 88. The court ruled that Mr. Mattila's statements were admissible. RP 88.

Mr. Mattila was tried along with one of his codefendants. RP 3. At trial, ten-year-old Paityn Mock testified that she was home alone when she saw a stranger in her house. RP 269, 271-72. She did not identify the person she saw as either Mr. Mattila or his codefendant. RP 271-76.

The state planned to introduce a transcript of Mr. Mattila's interview with the police. RP 500-16. The parties engaged in extended

argument about redaction of the transcript to remove references to the codefendant, hearsay, and other evidentiary issues. RP 431-78.

Regarding guns that Mr. Mattila's companions stole from one of the houses, the unredacted transcript read as follows:

YAKHOUR: So did they tell there were guns in the house?

MATTILA: Um, because -- yeah, un, Myk he's like -- he's like "Hey, there's -- I said, ... "What did you guys get," and they were like, 'Oh, there's some jewelry,' and like that. And then Myk said, "Hey, was there any guns?" He said, "Hey, Bulldog, did you get that gun that was in that case?" And Bulldog's like, "Oh, no, I didn't get it."

So, I mean, he was acting kind of weird so maybe he lied and did take the gun anyways, put it in his pants or something, or maybe it's sitting like on a bed or something like that in a case. So what I knew all they had was some jewelry...

Ex 97, page 18.

Mr. Mattila moved to exclude the portion of the transcript relaying the conversation between Myk and Bulldog on hearsay grounds. RP 464.

The state agreed to remove the references to guns starting at "Hey, was there guns?" RP 466. As a result, Deputy Robin Yakhour summarized her conversation with Mr. Mattila as follows:

I said, "Okay." I asked, "So did they tell you there were guns in the house?" Mr. Mattila replied, "Um -- because yes, um, one of them was like -- he's like, 'Hey, there's -- ' I said, 'Did you guys get what you -- did you guys get -- what did you guys get?' And they were like, 'Oh, there's some jewelry and like that.'"

RP 509.

Mr. Mattila's charge for unlawful possession of a firearm was based on a gun found in the trunk of the car he was driving. RP 299-301, 508-09, 673. Mr. Mattila's companions had stolen the gun from a house earlier that day and placed it in the trunk (with other stolen items) while Mr. Mattila sat in the driver's seat. RP 508-09, 673. At the close of evidence, Mr. Mattila moved to dismiss that charge because the state had presented insufficient evidence that he knew that the gun was in the trunk. RP 540. The court denied the motion, relying on Mr. Mattila's response of "Um --- because, yeah" to Yakhour's question about guns. RP 673.

In closing, the prosecutor argued that Mr. Mattila and his codefendant demonstrated lack of regard for the people affected by their actions:

These two Defendants had zero regard for other people's property, their sense of security, or their right to be safe in their own homes. They didn't care that ten-year-old Paityn Mock was home all alone that day, terrified, hiding in the pantry. They didn't consider how her mother would feel about leaving her daughter home alone that day, even for a few minutes.  
RP 658.

These two didn't care that the victims of their crimes worked hard to obtain the property that they had. They didn't care that those things meant something to them, and they didn't care how these people would feel after their homes had been invaded by complete strangers to them. It meant nothing to them, nothing.  
RP 659-60.

The jury convicted Mr. Mattila of all of the charges except for possession of a stolen vehicle. RP 716-17. They convicted his codefendant of one count of residential burglary and acquitted him of first degree burglary and theft of a firearm. RP 717.

The court sentenced Mr. Mattila to 115 months and ordered him to pay \$1,500 in fees for his court-appointed attorney. RP 737, CP 9, 11. His codefendant received only fourteen months. RP 749. This timely appeal follows. CP 19.

## **ARGUMENT**

### **I. MR. MATTILA RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.**

#### **A. Standard of Review.**

Ineffective assistance of counsel is an issue of constitutional magnitude that can be raised for the first time on appeal. *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009); RAP 2.5(a). Reversal is required if counsel's deficient performance prejudices the accused person. *Kylo*, 166 Wn.2d at 862 (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

- B. Defense counsel provided deficient performance that prejudiced Mr. Mattila.

Counsel's performance is deficient if it (1) falls below an objective standard of reasonableness based on consideration of all of the circumstances and (2) cannot be justified as a tactical decision. U.S. Const. Amend VI; *Kyllo*, 166 Wn.2d at 862. The accused is prejudiced by counsel's deficient performance if there is a reasonable probability that it affected the outcome of the proceedings. *Id.*

1. Defense counsel unreasonably failed to seek suppression of Mr. Mattila's statements and the evidence found in the vehicle based on his unlawful arrest.

The United States and Washington Constitutions prohibit warrantless arrests unless an exception to the warrant requirement applies. U.S. Const. Amends. IV, XIV; Wash. Const. art. I, § 7; *State v. Grande*, 164 Wn.2d 135, 141, 187 P.3d 248 (2008). Art. I, § 7 provides greater protection against warrantless searches and seizures than the Fourth Amendment. *State v. Ortega*, 177 Wn.2d 116, 122, 297 P.3d 57 (2013). The burden is on the state to prove that an exception to the warrant requirement justifies a warrantless arrest. *Grande*, 164 Wn.2d at 141. One such exception is probable cause to believe that a crime is being committed. *Id.*

Probable cause exists when an arresting officer is aware of facts and circumstances sufficient to cause a reasonable person to believe that a crime is being committed. *State v. Mance*, 82 Wn. App. 539, 541, 918 P.2d 527 (1996). That belief must be based on reasonable trustworthy information within the officer's knowledge at the time of arrest. *Id.*

The fact that a person matches a general description given by an alleged crime victim is not sufficient to establish probable cause. *Jenkins v. City of New York*, 478 F.3d 76, 90 (2d Cir. 2007) (*citing Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963)).

Unlawful arrest can be raised for the first time on appeal if actual prejudice appears in the record. *State v. McFarland*, 127 Wn.2d 322, 334, 899 P.2d 1251 (1995). All evidence obtained pursuant to an unlawful arrest must be suppressed as fruit of the poisonous tree. *State v. Walker*, 129 Wn. App. 572, 575, 119 P.3d 399 (2005) (*citing Wong Sun*, 371 U.S. 471).

Mr. Mattila's defense counsel provided ineffective assistance by failing to move for suppression of evidence that was the fruit of an unlawful arrest.

Deputy Buckner arrested Mr. Mattila without probable cause to believe that a crime had occurred. RP 63. Buckner testified that he arrested Mr. Mattila because he was parked in an isolated area, and

because his car matched the vague description given to 911 – a tan car with a dark stripe. RP 50, 59. Buckner admitted that he did not yet believe that a burglary had occurred when he arrested Mr. Mattila. RP 63. Buckner’s warrantless arrest of Mr. Mattila without probable cause violated Mr. Mattila’s rights under the state and federal constitutions. *Grande*, 164 Wn.2d at 141.

A suppression hearing was held before Mr. Mattila’s trial began. RP 34-88. Defense counsel argued only that the statements should be suppressed because the deputies made promises of leniency in order to induce his cooperation. RP 88. Defense counsel did not argue that Mr. Mattila’s statements or the evidence found in the vehicle were the fruit of an unlawful arrest. RP 88. Defense counsel had no valid tactical reason for failing to argue the unlawful arrest. This failure fell below an objective standard of reasonableness and constituted deficient performance. *Kyllo*, 166 Wn.2d at 862.

Following his arrest, Mr. Mattila implicated himself in the nearby burglary. He also confessed to other crimes of which he was not suspected. RP 54, Ex 2. Additionally, the police found items in the trunk of the vehicle, including firearms, linking Mr. Mattila to a burglary earlier that day. RP 250, 348-56. Mr. Mattila’s post-arrest statements and the evidence seized from the car made up the entirety of the state’s case

against him. Had counsel successfully moved for suppression of his statements and the evidence found in the car, the state would not have been able to proceed with the charges. Mr. Mattila was prejudiced by counsel's failure to seek suppression based on his unlawful arrest.

Mr. Mattila's defense counsel provided ineffective assistance by failing to move for suppression of his statements and evidence seized from the vehicle based on his illegal arrest. *Kyllo*, 166 Wn.2d at 862. Mr. Mattila's convictions must be reversed. *Id.*

2. Defense counsel provided ineffective assistance by failing to object to the misleading redaction of Mr. Mattila's statement.

Failure to object to the admission of evidence can constitute ineffective assistance of counsel where there is no valid tactical reason for the failure. *State v. Hendrickson*, 138 Wn. App. 827, 833, 158 P.3d 1257 (2007).

Mr. Mattila's defense counsel failed to object to the misleading redaction of his interview transcript, which provided the sole basis for his unlawful possession of a firearm charge. RP 509. Counsel's failure to object constituted ineffective assistance of counsel. *Hendrickson*, 138 Wn. App. at 833.

The state offered a 42-page transcript of Mr. Mattila's interview with police. Ex 97. In the unredacted transcript, Mr. Mattila stated that he

was only aware of his companions stealing jewelry from the first house they burgled. Ex 97, page 18. In the unredacted version, Mr. Mattila clearly says “So what I knew all they had was some jewelry...” Ex. 97, page 18.

The transcript that was read to the jury gave the impression that Mr. Mattila also knew that they had stolen guns. When asked if he’d been told that there were guns in the house, Mr. Mattila’s redacted reply was given as: “Um -- because yes...” RP 509.

Defense counsel did not object to Yakhour’s characterization of Mr. Mattila’s statement. RP 509.

Mr. Mattila’s unredacted statement showed that he was only aware that the other men had stolen jewelry from the house. Ex 97, page 18. Defense counsel had no valid tactical reason for failing to object to the misleading redaction and the officer’s characterization of the interview transcript. The failure to object constituted deficient performance. *Hendrickson*, 138 Wn. App. at 833.

Furthermore, the error was prejudicial. The trial judge indicated that this misleading excerpt provided the sole basis for denying Mr. Mattila’s motion to dismiss the UPF charge. RP 591. If defense counsel had objected and pointed out that the redaction was misleading, the charge would have been dismissed. In closing, the prosecutor argued that Mr.

Mattila's "Um --- because, yeah" statement was evidence that he knowingly possessed a firearm. RP 673. Mr. Mattila was prejudiced by counsel's deficient performance.

Mr. Mattila's defense counsel provided ineffective assistance by failing to object to the misleading characterization of his client's statement to the police. *Kyllo*, 166 Wn.2d at 862. Mr. Mattila's UPF conviction must be reversed. *Id.*

## **II. PROSECUTORIAL MISCONDUCT DENIED MR. MATTILA A FAIR TRIAL.**

### **A. Standard of Review.**

A prosecutor commits misconduct by making improper statements that prejudice the accused. *In re Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012). Absent an objection, a court can consider prosecutorial misconduct for the first time on appeal, and must reverse if the misconduct was flagrant and ill-intentioned. *Id.* A reviewing court analyzes the prosecutor's statements during closing in the context of the case as a whole. *State v. Jones*, 144 Wn. App. 284, 291, 183 P.3d 307 (2008) (Jones I).

- B. The prosecutor committed prejudicial misconduct by encouraging the jury to convict Mr. Mattila based on passion and prejudice rather than the evidence in the case.

Prosecutorial misconduct can deprive the accused of a fair trial.

*Glasmann*, 175 Wn.2d at 703-04; U.S. Const. Amends. VI, XIV, Wash.

Const. art. I, § 22. To determine whether a prosecutor's misconduct warrants reversal, the court looks at its prejudicial nature and cumulative effect. *State v. Boehning*, 127 Wn. App. 511, 518, 111 P.3d 899 (2005).

A prosecutor's improper statements prejudice the accused if they create a substantial likelihood that the verdict was affected. *Glasmann*, 175 Wn.2d at 704. The inquiry must look to the misconduct and its impact, not the evidence that was properly admitted. *Id.* at 711.

Prosecutorial misconduct during argument can be particularly prejudicial because of the risk that the jury will lend it special weight "not only because of the prestige associated with the prosecutor's office but also because of the fact-finding facilities presumably available to the office." Commentary to the *American Bar Association Standards for Criminal Justice* std. 3-5.8 (cited by *Glasmann*, 175 Wn.2d at 706).

A prosecutor must "seek conviction based only on probative evidence and sound reason." *Glasmann*, 175 Wn.2d at 704. It is misconduct for a prosecutor to make arguments designed to inflame the passions or prejudices of the jury. *Id.*

Likewise, it is misconduct for a prosecutor to “testify” to “facts” that have not been properly admitted into evidence. *Glasmann*, 175 Wn.2d at 705.

Finally, it is misconduct for a prosecutor to argue that the accused person’s “bad character,” selfishness, or lack of caring for other people constitutes evidence of guilt. *Washington v. Hofbauer*, 228 F.3d 689, 699 (6th Cir. 2000).

The prosecutor committed misconduct at Mr. Mattila’s trial by “testifying” to “facts” not in evidence, appealing to the passion and prejudice of the jury, and arguing that Mr. Mattila’s “bad character” was a reason to convict. In closing, the prosecutor argued at length that Mr. Mattila didn’t care about the occupants of the homes, including ten-year-old Paityn:

These two Defendants had zero regard for other people’s property, their sense of security, or their right to be safe in their own homes. They didn’t care that ten-year-old Paityn Mock was home all alone that day, terrified, hiding in the pantry. They didn’t consider how her mother would feel about leaving her daughter home alone that day, even for a few minutes.  
RP 658.

These two didn’t care that the victims of their crimes worked hard to obtain the property that they had. They didn’t care that those things meant something to them, and they didn’t care how these people would feel after their homes had been invaded by complete strangers to them. It meant nothing to them, nothing.  
RP 659-60.

This argument was designed to inflame the jurors' sympathy and encouraged the jury to convict based on passion and prejudice rather than the evidence in the case. *Glasmann*, 175 Wn.2d at 704. The prosecutor's assessment of Mr. Mattila's character also invited the jury to convict him because of his alleged selfishness rather than the facts. *Hofbauer*, 228 F.3d at 699.

Additionally, the argument impermissibly relied on "facts" that were not in evidence. *Glasmann*, 175 Wn.2d at 705. There was no evidence that Mr. Mattila or any of his companions knew that Paityn Mock was alone in the house. Similarly, there was no evidence that they knew or "didn't care" that she was "terrified."

Mr. Mattila was prejudiced by the prosecutor's improper argument. There was only tenuous evidence against Mr. Mattila for several of the charges. By pointing the jury to Mr. Mattila's "bad character," the prosecutor invited them to convict based on his alleged selfishness rather than based on the evidence at trial. There is a substantial likelihood that the prosecutor's improper argument affected the verdict. *Glasmann*, 175 Wn.2d at 704.

The prosecutor committed flagrant, ill-intentioned, prejudicial misconduct by making arguments designed to inflame the passion and

prejudice of the jury and “testifying” to “facts” not in evidence. *Glasmann*, 175 Wn.2d at 704-05. Mr. Mattila’s convictions must be reversed. *Id.*

**III. THERE WAS INSUFFICIENT EVIDENCE TO CONVICT MR. MATTILA OF UNLAWFUL POSSESSION OF A FIREARM.**

**A. Standard of Review.**

A conviction must be reversed for insufficient evidence if, taking the evidence in the light most favorable to the state, no rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Chouinard*, 169 Wn. App. 895, 899, 282 P.3d 117 (2012) *review denied*, 176 Wn.2d 1003, 297 P.3d 67 (2013).

**B. No rational trier of fact could have found beyond a reasonable doubt that Mr. Mattila knowingly possessed a firearm.**

In order to convict for unlawful possession of a firearm, the state must prove that the accused knowingly possessed a firearm. *State v. Marcum*, 116 Wn. App. 526, 534, 66 P.3d 690 (2003).

The state presented insufficient evidence for a rational trier of fact to find that Mr. Mattila knew about the firearm in the trunk of the car he was driving. *Chouinard*, 169 Wn. App. at 899; *Marcum*, 116 Wn. App. at 534.

Undisputed evidence showed that the guns were stolen and placed in the trunk by other people. RP 299-301, 508-09. The only evidence that

Mr. Mattila knew that the guns were in the trunk came in the form of a misleadingly redacted statement that he made to the police, as outlined above. Ex 97, page 18; Ex 98, page 18. The entirety of the statement, however, makes clear that Mr. Mattila knew only that his companions had stolen jewelry from the house. Ex. 97, page 18.

No rational trier of fact could have found beyond a reasonable doubt that Mr. Mattila knew there were guns in the trunk of the car he was driving. *Chouinard*, 169 Wn. App. at 899; *Marcum*, 116 Wn. App. at 534. The unlawful possession of a firearm conviction must be reversed. *Chouinard*, 169 Wn. App. at 899.

**IV. THE COURT ORDERED MR. MATTILA TO PAY THE COST OF HIS COURT-APPOINTED ATTORNEY IN VIOLATION OF HIS RIGHT TO COUNSEL.**

**A. Standard of Review.**

Reviewing courts assess questions of law and constitutional challenges *de novo*. *State v. Jones*, No. 41902-5-II, 2013 WL 2407119, --- P.3d --- (June 4, 2013) (Jones II); *State v. Lynch*, 87882-0, 2013 WL 5310164, --- Wn.2d --- (2013).

- B. The court violated Mr. Mattila's right to counsel by ordering him to pay the cost of his court-appointed attorney without first inquiring into whether he had the present or future ability to pay.

The Sixth Amendment guarantees an accused person the right to counsel. U.S. Const. Amends. VI; XIV. A court may not impose costs in a manner that impermissibly chills an accused's exercise of the right to counsel. *Fuller v. Oregon*, 417 U.S. 40, 45, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974). Under *Fuller*, the court must assess the accused person's current or future ability to pay prior to imposing costs. *Id.*

In Washington, the *Fuller* rule has been implemented by statute. RCW 10.01.160 limits a court's authority to order an offender to pay the costs of prosecution:

The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

RCWA 10.01.160(3).

Nonetheless, Washington cases have not required a judicial determination of the accused's actual ability to pay before ordering payment for the cost of court-appointed counsel. *State v. Blank*, 131 Wn.2d 230, 239, 930 P.2d 1213 (1997) (discussing *State v. Curry*, 118 Wn.2d 911, 916, 829 P.2d 166 (1992)); *see also, e.g., State v. Smits*, 152 Wn. App. 514, 523-524, 216 P.3d 1097 (2009); *State v. Crook*, 146 Wn.

App. 24, 27, 189 P.3d 811 (2008). This construction of RCW 10.01.160(3) violates the right to counsel.<sup>2</sup> *Fuller*, 417 U.S. at 45.

In *Fuller*, the U.S. Supreme Court upheld an Oregon statute that allowed for the recoupment of the cost a public defender. *Id.* The court relied heavily on the statute's provision that "a court may not order a convicted person to pay these expenses unless he 'is or will be able to pay them.'" *Id.* The court noted that, under the Oregon scheme, "no requirement to repay may be imposed if it appears *at the time of sentencing* that 'there is no likelihood that a defendant's indigency will end.'" *Id.* (emphasis added). Accordingly, the court found that "the [Oregon] recoupment statute is quite clearly directed only at those convicted defendants who are indigent at the time of the criminal proceedings against them but who subsequently gain the ability to pay the expenses of legal representation.... [T]he obligation to repay the State accrues only to those who later acquire the means to do so without hardship." *Id.*

Oregon's recoupment statute did not impermissibly chill the exercise of the right to counsel because "[t]hose who remain indigent or

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<sup>2</sup> In addition, the problem raises equal protection concerns. Retained counsel must apprise a client in advance of fees and costs relating to the representation. RPC 1.5(b). No such obligation requires disclosure before counsel is appointed for an indigent defendant.

for whom repayment would work ‘manifest hardship’ are forever exempt from any obligation to repay”. *Fuller*, 417 U.S. at 53. The Oregon scheme also provided a mechanism allowing an offender to later petition the court for remission of the payment if s/he became unable to pay. *Fuller*, 417 U.S. at 45.

Several other jurisdictions have interpreted *Fuller* to hold that the Sixth Amendment requires a court to find that the offender has the present or future ability to repay the cost of court-appointed counsel before ordering him/her to do so.<sup>3</sup>

Washington courts have erroneously interpreted *Fuller* to permit a court to order recoupment of court-appointed attorney’s fees in all cases, as long as the accused may later petition the court for remission if s/he cannot pay. *See e.g. Blank*, 131 Wn.2d at 239-242. This scheme turns

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<sup>3</sup> *See e.g. State v. Dudley*, 766 N.W.2d 606, 615 (Iowa 2009) (“A cost judgment may not be constitutionally imposed on a defendant unless a determination is first made that the defendant is or will be reasonably able to pay the judgment”); *State v. Tennin*, 674 N.W.2d 403, 410-11 (Minn. 2004) (“The Oregon statute essentially had the equivalent of two waiver provisions—one which could be effected at imposition and another which could be effected at implementation. In contrast, the Minnesota co-payment statute has no similar protections for the indigent or for those for whom such a co-payment would impose a manifest hardship. Accordingly, we hold that Minn.Stat. § 611.17, subd. 1 (c), as amended, violates the right to counsel under the United States and Minnesota Constitutions”); *State v. Morgan*, 173 Vt. 533, 535, 789 A.2d 928 (2001) (“In view of *Fuller*, we hold that, under the Sixth Amendment to the United States Constitution, before imposing an obligation to reimburse the state, the court must make a finding that the defendant is or will be able to pay the reimbursement amount ordered within the sixty days provided by statute”).

*Fuller* on its head and impermissibly chills the exercise of the right to counsel. *Fuller*, 417 U.S. at 53.

- C. The record does not support the sentencing court's finding that Mr. Mattila has the ability or likely future ability to pay his legal financial obligations.

Absent adequate support in the record, a sentencing court may not enter a finding that an offender has the ability or likely future ability to pay legal financial obligations. *State v. Bertrand*, 165 Wn. App. 393, 404, 267 P.3d 511 (2011).

In this case, the sentencing court entered such a finding without any support in the record. CP 8; RP 726-39. Indeed, the record suggests that Mr. Mattila lacks the ability to pay the amount ordered. The court found Mr. Mattila indigent at the end of the proceedings. RP 749-750. His lengthy incarceration and felony conviction will also negatively impact his prospects for employment. Accordingly, Finding No. 2.5 of the Judgment and Sentence must be vacated. *Id.*

The lower court ordered Mr. Mattila to pay \$1,500 in fees for his court-appointed attorney without conducting any inquiry into his present or future ability to pay. RP 726-39.

The court violated Mr. Mattila right to counsel. Under *Fuller*, it lacked authority to order payment for the cost of court-appointed counsel without first determining whether he had the ability to do so. *Fuller*, 417

U.S. at 53. The order requiring Mr. Mattila to pay \$1,500 in attorney fees must be vacated. *Id.*

**V. MR. MATTILA ADOPTS AND INCORPORATES THE ARGUMENTS SET FORTH IN SECTION D.2 OF MR. BRU'S OPENING BRIEF.**

Pursuant to RAP 10.1, Mr. Mattila adopts and incorporates section D.2 of Mr. Bru's Opening Brief.

**CONCLUSION**

Mr. Mattila's defense counsel provided ineffective assistance by failing to move to suppress his statements and the evidence seized from the car based on his unlawful arrest. Counsel also provided ineffective assistance by failing to object to the misleadingly redacted interview transcript. Mr. Mattila's convictions must be reversed for ineffective assistance.

The prosecutor committed prejudicial misconduct by encouraging the jury to convict Mr. Mattila based on passion and prejudice rather than the evidence in the case. There was insufficient evidence for a rational trier of fact to find Mr. Mattila guilty of unlawful possession of a firearm. Mr. Mattila's convictions must be reversed.

In the alternative, the court ordered Mr. Mattila to pay the cost of his court-appointed attorney in violation of his Sixth Amendment right to counsel. The order for Mr. Mattila to pay \$1,500 in attorney's fees must be vacated.

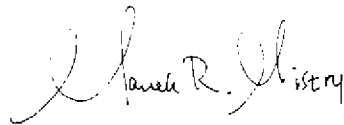
Respectfully submitted on October 11, 2013,

**BACKLUND AND MISTRY**



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Jodi R. Backlund, WSBA No. 22917  
Attorney for the Appellant



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Manek R. Mistry, WSBA No. 22922  
Attorney for the Appellant



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Skylar T. Brett, WSBA No. 45475  
Attorney for Appellant

## CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Jacob Mattila, DOC #358927  
Washington Corrections Center  
PO Box 900  
Shelton, WA 98584

With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Clark County Prosecuting Attorney  
prosecutor@clark.wa.gov

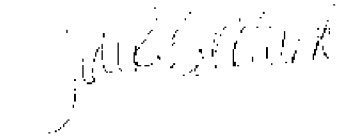
and to

Lisa Tabbut, Counsel for Co-Defendant  
lisa.tabbut@comcast.net

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on October 11, 2013.



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Jodi R. Backlund, WSBA No. 22917  
Attorney for the Appellant

# BACKLUND & MISTRY

**October 11, 2013 - 3:10 PM**

## Transmittal Letter

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prosecutor@clark.wa.gov  
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